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Supreme Court of the United States

October Term, 1968.

No. 923

CONSUMERS PRODUCTS OF AMERICA, INC., a corporation, EASTERN GUILD, INC., a corporation, and JACK WEINSTOCK, NAT LOESBERG, JACK GERSTEL, and LOUIS TAFLER, individually and as officers of said corporations,

Petitioners

v.

FEDERAL TRADE COMMISSION and
THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

THEODORE R. MANN,
1315 Walnut Street,
Philadelphia, Pennsylvania,
Attorney for Petitioners.

GOODIS, GREENFIELD, NARIN & MANN,
Of Counsel

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-5711 Area Code 215

INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	6
Appendix A—Opinion Below	7
Appendix B—Judgment Below	15
Appendix C—Order of Federal Trade Commission	17
Appendix D—Opinion of Federal Trade Commission	22
Appendix E—Opinion of Hearing Examiner	41
Appendix F—Complaint	58
Appendix G—Text of Statutes Involved	73

AUTHORITIES.

Cases:

	Page
American Home Prods. Corp. v. Federal Trade Commission, 402 F. 2d 232	4, 5
Consumers Prods. of America, Inc. v. Federal Trade Commission, 401 F. 2d 930	1
Consumers Prods. of America, Inc., Trade Reg. Rep. ¶ 18,059	1
Federal Trade Commission v. Morton Salt Co., 334 U. S. 37 (1948)	5
Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441 (1922)	5
Jacob Siegel Co. v. Federal Trade Commission, 327 U. S. 608 (1946)	5
National Labor Relations Board v. Express Publishing Co., 312 U. S. 426 (1941)	5

Statutes:

	Page
15 U. S. C. § 45(a)	4
15 U. S. C. § 45(b)	4
15 U. S. C. § 45(c)	1, 3
15 U. S. C. § 45(1)	4
15 U. S. C. § 56	4
28 U. S. C. § 1254(1)	1

CONSUMERS PRODUCTS OF AMERICA, INC., EASTERN GUILD, INC., JACK WEINSTOCK, NAT LOESBERG, JACK GERSTEL and LOUIS TAFLER, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on October 11, 1968.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit (App. A, *infra*, pp. 7-14) is reported at 401 F. 2d 930. The opinion of the Federal Trade Commission (App. D, *infra*, pp. 22-40) is reported at Trade Reg. Rep. ¶ 18,059. The opinion of the Hearing Examiner (App. E, *infra*, pp. 41-57) is not reported.

JURISDICTION.

The judgment of the court below (App. B, *infra*, pp. 15-16) was entered on October 11, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and Section 5(c) of the Federal Trade Commission Act, 15 U. S. C. § 45(c).

QUESTION PRESENTED.

Petitioners were found by the Federal Trade Commission to have engaged in unfair and deceptive trade practices in violation of Section 5 of the Federal Trade Commission Act. The Commission concluded petitioners had engaged in "bait-and-switch" advertising in which they had falsely represented: (1) that encyclopedias would be delivered to

prospective purchasers for a five-day free examination without any further obligation; (2) that the advertised offer would expire in ten days; (3) that a dictionary would be delivered without charge or obligation; (4) and, through use of the trade name "Educational Foundation", that they operated a non-profit organization engaged in educational work. The Commission entered an order specifically prohibiting, inter alia, the foregoing representations. In addition, paragraph 1 of the order enjoined petitioners to cease and desist from

> "Using, in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise or services."

The Court of Appeals for the Third Circuit enforced the Commission's order, including paragraph 1, with a modification not here relevant.

The question presented is:

Whether paragraph 1 of the Commission's order is so broad, vague and undefined as to (1) subject petitioners to contempt penalties for activity neither identified in the order nor the subject of any administrative proceedings and (2) thereby effectively shift enforcement of the Act to the district courts.

STATUTES INVOLVED.

The statutes involved are set forth below (Appendix G, *infra*, pp. 73-75).

STATEMENT OF THE CASE.

The administrative complaint in this case alleged that petitioners engaged in certain specific unfair and deceptive acts and practices and unfair methods of competition in connection with the interstate sale of encyclopedias (App. F, *infra*, pp. 58-72). The petitioners denied many of the allegations. Hearings were held before a hearing examiner who filed an initial decision on January 10, 1967 (App. E, *infra*, pp. 41-57), sustaining the essential allegations of the complaint and proposing a cease and desist order. An appeal was taken from this decision to the Federal Trade Commission. On September 7, 1967, after submission of briefs and oral argument, the Commission adopted most of the hearing examiner's findings and issued a Final Order (App. C, *infra*, pp. 17-21).

Petitioners appealed the Commission's Final Order to the Court of Appeals for the Third Circuit pursuant to Section 5(c) of the Federal Trade Commission Act, 15 U. S. C. § 45(c), requesting the Court of Appeals to delete, inter alia, paragraph 1 of the Commission's order because it is so broad and general as to subject them to potential contempt citations for future activities without benefit of the administrative hearing and warning required by the Act. The Court of Appeals on October 11, 1968 entered judgment enforcing the Commission's order, including paragraph 1, with a modification not here relevant (App. B, *infra*, pp. 15-16).

REASONS FOR GRANTING THE WRIT.

The Order entered by the Commission and enforced by the Court of Appeals should be reviewed by this Court for the following reasons:

1. Paragraph 1 of the order (App. C, *infra*, pp. 17-21) is an abdication by the Commission of its jurisdiction. The Commission found that certain specific advertised statements were misleading and enjoined their repetition in paragraphs 4, 5, 6 and 8 of its order. But in paragraph 1, the Commission enjoined petitioners from using a sales plan wherein "false, misleading or deceptive statements or representations are made in order to obtain leads . . . ." The Court of Appeals for the Sixth Circuit said in a case squarely on point: "The effect of this provision of the Commission's order is to admonish petitioner not to violate the law again. Such an order would, in practical effect, transfer the task of enforcing the Federal Trade Commission Act, as regards this petitioner, to the district courts under 15 U. S. C. § 56. This is not within the contemplation of the Act". *American Home Prods. Corp. v. Federal Trade Commission*, 402 F. 2d 232 (6th Cir. 1968).

2. The administrative process fails in its essential purposes where the cease and desist order is not substantially narrower than the Act. Section 5(b) requires that the Commission apply the broad standards of the Act to the specific activity of those in commerce. At the conclusion of that definitional process, an alleged offender is not punished. Rather a cease and desist order is issued, which is in the nature of a notification to the offender, for the violation of which he is subject to severe penalties under Section 5(1) of the Act.

Here the order (paragraph 1) is not substantially more specific than the Act itself. (The Act [Sec. 5(a)(1)] de-

clares unlawful "unfair or deceptive acts or practices in commerce"; paragraph 1 enjoins "false, misleading or deceptive statements or representations . . . made in order to obtain leads . . . ."). Where that is so the order fails in its essential purposes of defining the type of conduct proscribed by the Act and notifying the petitioners thereof.

If petitioners, for example, were to make statements about their product unrelated to those which the Commission has found to be misleading (in paragraphs 4, 5, 6 and 8 of the order), they may be found guilty of contempt and made to forfeit $5,000 per day even in the absence of the prior administrative process required by Congress to determine if such statements have a tendency to mislead. This is in clear violation of the Act. *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37 (1948); *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608 (1946); *American Home Prods. Corp. v. Federal Trade Commission*, 402 F. 2d 232 (6th Cir. 1968).

3. Consideration by this Court is necessary on the independent ground that the holding below conflicts with the decision on October 18, 1968 of the Court of Appeals for the Sixth Circuit in *American Home Prods. Corp. v. Federal Trade Commission*, 402 F. 2d 232 and conflicts in substance with the principles long established by this Court in *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37 (1948); *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608 (1946); *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426 (1941); and *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441 (1922).

The issue raised by this conflict is of general and continuing importance to the proper enforcement of the federal administrative regulatory statutes and should be reviewed by this Court.

CONCLUSION.

The decision of the Court of Appeals for the Third Circuit raises a question of general importance in the proper enforcement of the federal administrative regulatory statutes. This decision is in direct conflict with a decision of the Sixth Circuit and contrary to a long established principle established by this Court. The present petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

THEODORE R. MANN,
Attorney for Petitioners.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16956

CONSUMERS PRODUCTS OF AMERICA, INC., A CORPORATION, EASTERN GUILD, INC., A CORPORATION, AND JACK WEINSTOCK, NAT LOESBERG, JACK GERSTEL, AND LOUIS TAFLER, INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATIONS,

Petitioners,

v.

FEDERAL TRADE COMMISSION AND THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

Argued June 4, 1968

Before HASTIE, *Chief Judge,* STALEY and SEITZ, *Circuit Judges.*

OPINION OF THE COURT

(Filed September 12, 1968)

By STALEY, *Circuit Judge.*

This case is before the court upon a petition to review a cease and desist order of the Federal Trade Commission.

The order was issued at the conclusion of an administrative proceeding held pursuant to a complaint charging petitioners, Consumers Products of America, Inc., Eastern Guild, Inc., Keystone Guild, Inc., and four individuals, Nat Loesberg, Jack Weinstock, Jack Gerstel, and Louis Tafler, with violating § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, by engaging in unfair and deceptive acts and practices and unfair methods of competition in connection with the interstate sale of encyclopedias.

Aside from its basic finding that petitioners were engaged in bait-and-switch advertising,[1] the Commission also found that advertisements of petitioners misled and falsely represented: that an encyclopedia will be delivered to prospective purchasers for a five-day free examination without any further condition, obligation or requirement; that the offer in the advertisements is limited to and expires within ten days; that a dictionary is "free" and is delivered to and may be retained by all prospective purchasers without charge, condition or obligation other than as set forth in the advertisement; and that through use of the trade name

1. The evidence shows that petitioners' advertisements of World Wide Encyclopedia (a set purchased by petitioners for about $4.00 and advertised and sold in all cases for $9.95), were made for the purpose of obtaining the names and addresses of people who were interested in the purchase of an encyclopedia principally for the use of school age children. When the prospective buyer filled out the coupon and sent it to petitioners' place of business, the encyclopedia was not mailed out, instead, a salesman called upon the prospective customer, demonstrated at the most one copy of the World Wide Encyclopedia, and quickly introduced the purchaser to the more expensive New Standard Encyclopedia (a set which was not advertised and which was purchased by petitioners for $25 and sold at prices ranging from $129 to $159). The salesman then exerted every possible effort to sell the New Standard Encyclopedia.

In the words of the hearing examiner: "This is nothing more than an age old bait and switch operation with the advertisement of the World Wide Encyclopedia being the bait to get the prospective purchaser's name and address and thereafter switch him to the New Standard Encyclopedia."

"Educational Foundation" petitioners operate a non-profit organization engaged in educational work. Paragraphs 4, 5, 6, and 8 of the Commission's order specifically enjoin petitioners from continuing the above-mentioned misrepresentions,[2] and with the exception of a non-meritorious challenge to paragraph 8,[3] petitioners do not object to this portion of the order. What they do vigorously oppose, however, is paragraph 1 of the order requiring them to forthwith cease and desist from:

---

2. These paragraphs require petitioners to cease and desist from:

"4. Representing, directly or indirectly, that said merchandise will be delivered to prospective purchasers for a five-day free examination or for any other period of time without clearly and conspicuously revealing all of the conditions, obligations or requirements, pertaining to said offer.

"5. Representing, directly or indirectly, that any merchandise is "free" or is delivered to or may be retained by purchasers or prospective purchasers without clearly and conspicuously revealing all of the terms, conditions or obligations necessary to the receipt and retention of said merchandise.

"6. Representing, directly or indirectly, that any offer is limited as to time, provided, however, that it shall be a defense in any enforcement proceeding instituted hereunder for [petitioners] to establish that such time restriction or limitation was actually imposed and in good faith adhered to by [petitioners].

* * *

"8. Using the trade name 'Educational Foundation' in connection with [petitioners'] enterprises or representing, in any other manner, that [petitioners] operate any nonprofit organization engaged in educational work."

3. Petitioners disagree with the Commission's finding that use of the term "Educational Foundation" has a tendency and capacity to mislead the public. The Commission fully agreed with the hearing examiner's conclusion that petitioners' use of this term "clearly imports that the [petitioners] are engaged in some sort of non-profit operation" when they are, in fact, in business strictly for profit. We think there is a basis for the Commission's finding in this regard, and therefore it will not be disturbed. *Cf.* F. T. C. v. Mary Carter Paint Co., 382 U. S. 46, 48-49 (1965); Carter Products, Inc. v. F. T. C., 323 F. 2d 523, 528 (C. A. 5, 1963); Perloff v. F. T. C., 150 F. 2d 757, 759 (C. A. 3, 1945).

"Using, in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise or services."

It is urged by petitioners that this paragraph is too broad and too generalized because the only false, misleading or deceptive statements found by the Commission to have been made to obtain leads or prospects are those which are specifically covered by paragraphs 4, 5, 6, and 8 of the order. Thus, it is argued, if paragraph 1 is intended to refer to those particular statements, it is mere surplusage and therefore unnecessary, but if it is intended to cover something broader than that, it is improper and potentially may subject petitioners to contempt citations without benefit of the kind of administrative hearing to which they are entitled under the Act.

The Supreme Court of the United States has held that when the breadth of the Commission's order is attacked, the question on review is whether the Commission chose a remedy "reasonably related" to the violations which it found. See, e.g., F. T. C. v. Ruberoid Co., 343 U. S. 470, 473 (1952); Jacob Siegal Co. v. F. T. C., 327 U. S. 608, 611-613 (1946). When considering this question, it must be kept in mind that Congress has placed the responsibility for fashioning orders upon the Commission, F. T. C. v. National Lead Co., 352 U. S. 419, 429 (1957); F. T. C. v. Cement Institute, 333 U. S. 683, 726 (1948), and this responsibility necessarily includes the prevention of illegal future practices. As stated by the Court in F. T. C. v. Ruberoid Co., supra at 473:

"* * * In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. * * *"

An example of the latitude permitted the Commission in fashioning cease and desist orders, appears in the case of F. T. C. v. Henry Broch & Co., 368 U. S. 360 (1962). There the Commission found that Broch, a broker selling food products for many seller principals, had violated § 2(c) of the Clayton Act by reducing the commission that Canada Foods, Ltd., a processor of apple concentrate, ordinarily paid him, in order to make possible Canada Foods' acceptance of an offer from J. M. Smucker Co. to buy an unusually large quantity of apple concentrate at less than Canada Foods' established price. Paragraph 1 of the Commission's order prohibited Broch from repeating his illegal practice in connection with sales for Canada Foods, or for "any other seller principal," to Smucker, or "to any other buyer." Broch argued that this paragraph was too broad in its application to sales from all seller principals to all buyers because the order was based only upon findings limited to an asserted illegal payment from Canada Foods to Smucker. The Court, however, saw no merit in this argument, stating:

"* * * The Commission has wide discretion to formulate a remedy adequate to prevent Broch's repetition of the violation he was found to have committed.

> See *Jacob Siegel Co. v. Federal Trade Comm'n,* 327 U. S. 608, 611-612. We cannot say that the Commission exceeded its discretion in banning repetitions of Broch's violation in connection with transactions involving *any* seller and buyer, rather than simply forbidding recurrence of the transgression in sales between Canada and Smucker. * * *'' 368 U. S. at 364.

We think the Commission's discretion in cases involving false, deceptive and misleading advertising is at least as wide as that permitted in situations concerning illegal commission reductions. See F. T. C. v. Colgate-Palmolive Co., 380 U. S. 374 (1965). For, in our judgment, the well-being of innumerable members of our society has been, and must continue to be, protected by vigorous, though judicious, exercise of the Commission's expertise in evaluating the impact and meaning of sophisticated advertisements and their capacity to deceive or mislead. *Cf.* Doherty, Clifford, Steers & Shenfield, Inc. v. F. T. C., 392 F. 2d 921 (C. A. 6, 1968); Erickson v. F. T. C., 272 F. 2d 318 (C. A. 7, 1959), cert. denied, 362 U. S. 940 (1960). In *Erickson v. F. T. C.,* supra, the Court of Appeals for the Seventh Circuit was presented with a problem very similar to the one before us. There the Commission found that petitioner falsely represented and advertised that he could, without qualification, through the use of his preparations and method of treatment cause, among other things, new hair to grow on hairless heads. The court upheld the Commission's findings, but the petitioner argued that the facts as found would not support the Commission's order prohibiting the advertising "of any other preparations for use in treatment of hair and scalp conditions." The Court rejected this contention, holding that the above-quoted portion of the order related to the false representations contained in petitioner's ad-

vertising, and agreed with the Government's claim that "'[u]nless the Commission's order is broad enough to cover all preparations petitioner need only change the formula of his present preparations and continue to engage in the same false and deceptive practices condemned by the Commission.'" 272 F. 2d at 322.

We think that this reasoning applies with equal force to the order in the instant case, and that paragraph 1 of the order does indeed have a "reasonable relationship" to the unlawful practices found to exist by the Commission. Were it not for this paragraph, petitioners could feel free to merely "change the formula" of their false, misleading and deceptive statements, and continue to deceive the public as they had before. Under the circumstances, we do not think that it is asking too much of petitioners to require them to simply tell the truth in their advertisements and oral representations.[4] As stated by Mr. Justice Clark in F. T. C. v. National Lead Co., 352 U. S. 419, at 431, "[petitioners] must remember that those caught violating the Act must expect some fencing in."

Petitioners next object to the wording of paragraph 10 of the Commission's order requiring them to obtain from

4. As for petitioners' fear of a possible contempt proceeding, the Supreme Court pointed to the solution in F. T. C. v. Colgate-Palmolive Co., 380 U. S. 374, 394 (1965), noting:

> "* * * If, however, a situation arises in which respondents are sincerely unable to determine whether a proposed course of action would violate the present order, they can, by complying with the Commission's rules, oblige the Commission to give them definitive advice as to whether their proposed action, if pursued, would constitute compliance with the order."

If petitioners fail to avail themselves of this procedure, and the Commission suspects a violation of paragraph 1 of the order, petitioners will have ample opportunity to dispute the applicability of the order's prohibition within the context of a given factual situation. See Jaffe, The Judicial Enforcement of Administrative Orders, 76 Harv. L. Rev. 865 (1963).

present and future salesmen an agreement "to abide by the requirements of said order and to refrain from engaging in any of the acts or practices prohibited by said order; and for failure so to do, agreeing to dismissal or to withholding of commissions, salaries and other remunerations."

The Commission, in its supplemental brief filed after oral argument, has informed the court that it would agree to a modification of paragraph 10 which would require petitioners to merely:

> "* * * deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of [petitioners'] products and * * * secure from each salesman or other person a signed statement acknowledging receipt of said order."

In light of this development, it is unnecessary for us to take up the objections lodged by petitioners against the initial paragraph 10. We think that the modified paragraph effectively accomplishes the Commission's main purpose of assuring that petitioners' salesmen are made aware of the terms of the order, while at the same time, it avoids the suspicion of possibly impinging upon the legal rights of petitioners and their salesmen. The modification, therefore, is approved.

We have carefully considered petitioners' remaining contentions, but we deem them all to be so lacking in merit that further discussion is unwarranted. Accordingly, the Commission's order, as modified will be enforced.

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 16,956.

CONSUMERS PRODUCTS OF AMERICA, INC., A CORPORATION, EASTERN GUILD, INC., A CORPORATION, KEYSTONE GUILD, INC., A CORPORATION, and JACK WEINSTOCK, NAT LOESBERG, JACK GERSTEL, AND LOUIS TAFLER, INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATIONS,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Present: HASTIE, *Chief Judge,* and STALEY and SEITZ, *Circuit Judges.*

JUDGMENT.

Consumers Products of America, Inc., Eastern Guild, Inc., and Keystone Guild, Inc., corporations, and Jack Weinstock, Nat Loesberg, Jack Gerstel, and Louis Tafler, individuals, having filed a petition to review and set aside an order to cease and desist issued by the Federal Trade Commission on September 7, 1967, in its Docket No. 8679; and the matter having been heard by this Court on briefs and oral argument on June 4, 1968; and the respondent Federal Trade Commission having agreed to a modification

of paragraph 10 of the aforesaid order to cease and desist; and the Court on September 12, 1968, having issued its opinion directing modification and enforcement of the said order; it is now therefore

ORDERED, ADJUDGED AND DECREED that paragraph 10 of the Commission's order to cease and desist be modified to read as follows:

> 10. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the entire order to cease and desist as modified herein be, and it hereby is, affirmed and enforced, and that petitioners be, and they hereby are, commanded to obey the said order and to comply therewith.

By the Court.

STALEY,
Circuit Judge.

Entered: October 11, 1968.

APPENDIX C.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

DOCKET No. 8679.

IN THE MATTER OF

CONSUMERS PRODUCTS OF AMERICA, INC.,
A CORPORATION,
EASTERN GUILD, INC., A CORPORATION,
KEYSTONE GUILD, INC., A CORPORATION,

AND

JACK WEINSTOCK,
NAT LOESBERG,
JACK GERSTEL, AND
LOUIS TAFLER, INDIVIDUALLY AND AS
OFFICERS OF SAID CORPORATIONS.

FINAL ORDER.

This matter having been heard by the Commission upon respondents' appeal from the initial decision, and the Commission having determined that said appeal should be

granted in part and denied in part, and having further determined that the initial decision should be modified to conform with the views expressed in the accompanying opinion:

IT IS ORDERED that the initial decision be modified by striking therefrom finding number 20 beginning on page 7 thereof and substituting the following:

> 20. The complaint alleges that respondents have falsely represented that the World-Wide Encyclopedia is comprehensive, complete, authoritative, new and up to date. The evidence adduced by complaint counsel in support of this allegation is the testimony of an expert witness who testified on the first day of the hearings in the absence of respondents' counsel. Although this witness was subsequently cross-examined by respondents' counsel, the Commission has determined not to consider the testimony of any witness who testified when respondents' counsel was not present. Accordingly, the Commission finds that there is not sufficient evidence to support this allegation of the complaint.

IT IS FURTHER ORDERED that the initial decision be modified by striking therefrom the last sentence in finding number 28 on page 10.

IT IS FURTHER ORDERED that the order contained in the initial decision be, and it hereby is, modified to read as follows:

> IT IS ORDERED that respondents Consumers Products of America, Inc., a corporation, and its officers, Eastern Guild, Inc., a corporation, and its officers, Key-

stone Guild, Inc., a corporation, and its officers, and Jack Weinstock, Nat Loesberg, Jack Gerstel and Louis Tafler, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of encyclopedias, books or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise or services.

2. Discouraging the purchase of, or disparaging, any products or services which are advertised or offered for sale.

3. Representing, directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services.

4. Representing, directly or indirectly, that said merchandise will be delivered to prospective purchasers for a five-day free examination or for any other period of time without clearly and conspicuously revealing all of the conditions, obligations or requirements, pertaining to said offer.

5. Representing, directly or indirectly, that any merchandise is "free" or is delivered to or may be retained by purchasers or prospective purchasers without clearly and conspicuously revealing all of

the terms, conditions or obligations necessary to the receipt and retention of said merchandise.

6. Representing, directly or indirectly, that any offer is limited as to time, provided, however, that it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that such time restriction or limitation was actually imposed and in good faith adhered to by respondents.

7. Representing, directly or indirectly, that The First National Fidelity Co., Metropolitan Credit Bureau, or Vogt Collection Agency or any other fictitious name, or trade names owned in whole or in part by respondents or over which respondents exercise any direction or control, are independent, bona fide financing, collection or credit reporting agencies; or representing in any other manner that delinquent accounts have been turned over to a bona fide, separate collection agency or to a credit reporting agency for collection or for any other purpose, unless respondents in fact have turned such accounts over to an agency of the nature represented.

8. Using the trade name "Educational Foundation" in conection with respondents' enterprises or representing, in any other manner, that respondents operate any nonprofit organization engaged in educational work.

9. Misrepresenting, in any manner, the kind of offer made to sell merchandise, the terms, limitations or conditions of any offer, or the nature or status of respondents' business or of their collection operations.

10. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of the respondents' products to purchasers; and failing to secure from each such person a signed statement acknowledging receipt of said order and agreeing to abide by the requirements of said order and to refrain from engaging in any of the acts or practices prohibited by said order; and for failure so to do, agreeing to dismissal or to the withholding of commissions, salaries and other remunerations or both to dismissal and to withholding of commissions, salaries and other remunerations.

IT IS FURTHER ORDERED that the charge set forth in subparagraph 5 of Paragraph Seven of the complaint be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that the hearing examiner's initial decision, as modified and as supplemented by the Commission's opinion, be, and it hereby is, adopted as the decision of the Commission.

IT IS FURTHER ORDERED that respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

By the Commission.

SEAL

JOSEPH W. SHEA,
Joseph W. Shea,
Secretary.

ISSUED: September 7, 1967

APPENDIX D.

UNITED STATES OF AMERICA

Before Federal Trade Commission

Commissioners:

Paul Rand Dixon, *Chairman*
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

Docket No. 8679

In the Matter of
CONSUMERS PRODUCTS OF AMERICA, INC.,
a Corporation,
EASTERN GUILD, INC., a Corporation,
KEYSTONE GUILD, INC., a Corporation,

and

JACK WEINSTOCK, NAT LOESBERG, JACK GERSTEL, and LOUIS TAFLER, Individually and as Officers of Said Corporations.

OPINION OF THE COMMISSION.

By Dixon, Commissioner:

This case comes before the Commission upon respondents' appeal from the initial decision wherein the hearing examiner found that the evidence supports all of the allegations of the complaint, and issued his order to cease and desist.

The respondents are three corporations and four individuals who are named in their official capacities and individually. At the time complaint issued, these individuals were the officers and stockholders of the corporate respondents. One of these individuals, Jack Gerstel, retired in 1965 but retained his stock ownership. The respondents are charged with engaging in certain unfair and deceptive practices in the sale of encyclopedias in violation of Section 5 of the Federal Trade Commission Act.

As found by the hearing examiner and not disputed on this appeal, respondents are engaged in the sale of two sets of encyclopedias. One set, known as World-Wide Encyclopedia, consists of ten volumes and is sold by respondent Consumers Products of America, Inc., at a price of $9.95. The other set, New Standard Encyclopedia, which, for a price of $159.50, includes fourteen volumes and an information and quarterly extension service, is sold by respondent Eastern Guild, Inc.

Also undisputed are the examiner's findings that Consumers Products spends about $4,000 monthly in advertising World-Wide Encyclopedia through newspaper advertisements, car cards for use in transit systems, TV Guide and television, and that it does not employ any salesmen in selling this encyclopedia. Eastern Guild, Inc., does no advertising of the New Standard Encyclopedia and employs an average of 12 salesmen a year to sell this set.

The complaint charges that through advertisements for the World-Wide Encyclopedia respondents have falsely and deceptively represented (1) that they were making a bona fide offer to sell the World-Wide Encyclopedia at the price and on the terms and conditions stated in the ads, (2) that the World-Wide Encyclopedia and a dictionary would be delivered to prospective purchasers for a five day free

examination without further condition, obligation or requirement, (3) that the offer is limited and expires in ten days, (4) that a dictionary is given "free" and is delivered to and may be retained by all prospective purchasers without charge, condition or obligation other than as set forth in the ads, (5) that the World-Wide Encyclopedia is comprehensive, complete, authoritative, new and up to date, and (6) that through the use of the trade name "Educational Foundation," they operate a nonprofit organization engaged in educational work. Additionally, the complaint charges respondents with falsely representing that certain trade names under which they operate are bona fide, independent financial and credit reporting institutions.

We consider first respondents' argument that the hearing examiner erred in conducting the first day's hearing in the absence of respondents' counsel. The facts on this issue are likewise not disputed.

In summary, these facts show that hearings in this matter were set to begin on Monday, September 26, 1966, in Philadelphia, Pennsylvania. On Friday, September 23, 1966, respondents' counsel contacted the hearing examiner and advised him that he was engaged in a trial before the Common Pleas Court in Philadelphia, and that the trial would be carried over to September 26. For this reason, the initial hearing set for Monday was cancelled and reset for September 27. On September 26, the examiner learned that respondents' counsel would not be available on September 27, as the Common Pleas Court trial would extend through that date. The examiner states that he could not contact complaint counsel or any of the witnesses scheduled to appear on September 27. He, therefore, told respondents' counsel that hearings would begin as scheduled and to have another attorney appear at the hearing.

A member of respondents' counsel's firm appeared at the initial hearing. He informed the examiner that only respondents' counsel was prepared to proceed, and requested a continuance until the following morning. When this was denied, he left before any witnesses were called.

On the following morning, respondents' counsel was furnished with a transcript of the previous day's hearing and was informed that he had the right to recall for cross-examination any witness who had testified. Subsequently, pursuant to his request, respondents' counsel did fully cross-examine an expert witness and one of five consumer witnesses who testified at the initial hearing.[1]

The hearing examiner states that respondents' counsel made no specific objection to any of the questions or answers appearing in the transcript of the first day's hearing, and concluded that respondents' counsel failed to demonstrate with any specificity as to how respondents have possibly been prejudiced by the conduct of the hearings.

In their appeal on this issue, respondents are particularly concerned with the testimony of the expert witness. While respondents claim to have shown prejudice as a result of this witness' testimony, they argue that even were they not able to do so, the question is usually so impossible to answer in retrospect that provable prejudice cannot be a determinative factor.

During oral argument before the Commission, respondents' counsel stated that a determination as to whether prejudice has been shown, as well as a determination on the motion to strike the evidence, could be made on the basis of the expert's testimony on cross-examination.

1. Although six consumer witnesses testified in the absence of respondents' counsel, the testimony of one of these witnesses was stricken on the joint motion of complaint counsel and respondents' counsel.

We have closely reviewed the testimony of the expert witness, both on direct and cross-examination, as well as the testimony of the five consumer witnesses who appeared in the absence of respondents' counsel, and find no substance in respondents' claim of demonstrated prejudice. For example, respondents contend that the expert testified concerning an earlier edition of the World-Wide Encyclopedia and had never seen the edition under attack. The latest edition of this set of encyclopedias was copyrighted in 1962. We have examined the set of encyclopedias (CX 7) upon which the expert based her testimony. Of this set of 10 encyclopedias, only two volumes were not copyrighted in 1962 (Volumes 1 and 8). The expert's testimony concerning the inadequacy of the set is not limited to the two earlier editions but encompasses the entire set.

Also as to the alleged prejudice, respondents state that one of the volumes had been misbound by the binder. We are not convinced from this record that, as respondents contend, the expert's testimony would have been altogether different if the binding error in this volume had been brought to her attention. In any event, the other volumes were properly bound and we fail to see how respondents could possibly be prejudiced by her testimony concerning the other volumes.

Respondents' counsel, during oral argument, took the position that the examiner's findings predicated on the expert's testimony "go to the heart of this case" and therefore the bait and switch charge, which is the principal issue under the complaint, cannot be sustained without those findings. This is clearly in error. The advertising representation to which the expert's testimony is directed is only a part of the bait aspect of respondents' sales scheme. Other claims were allegedly used to lure persons

interested in buying an encyclopedia to respond to respondents' offer. The examiner's findings are not based solely on the testimony of the expert but take into consideration the entire record, including the testimony of consumer witnesses who testified in the presence of respondents' counsel. Although we think that respondents have failed to demonstrate prejudice,[2] we will grant their request and will base our decision exclusively on the testimony of the witnesses who testified after the first day of the hearings.

We turn, therefore, to a consideration of respondents' argument that the weight of the evidence does not support the examiner's finding that their advertisements did not present a bona fide offer to sell the World-Wide Encyclopedia. Specifically, the examiner found that the advertisements were used as bait to get the prospective purchaser's name and address and thereafter switch him to the New Standard Encyclopedia.

Respondents first contend that the representations in their advertising for the World-Wide Encyclopedia are not false or misleading and therefore cannot constitute bait advertising.

The record contains numerous examples of the advertisements used by respondents. All follow the same

2. In *N. L. R. B. v. American Potash & Chemical Corp.*, 98 F. 2d 488 (9th Cir. 1938), respondents' attorney's request on the morning of the hearing for a 24 hour continuance, on the ground that he had to be in Federal District Court on another matter, was denied by the Board. As a result, the Board's case went on for about one hour in the absence of any attorney for respondents. The court pointed out that the denial of a motion to postpone the commencement of a hearing may be necessitated by the presence of the assembled witnesses of the Board. The court held that "In the absence of a showing of *prejudicial* error in the exercise of the Board's discretion, we cannot set aside the Board's findings." (Emphasis in original.)

format. In each newspaper advertisement there is a certificate which a prospective purchaser completes by filling in his name and address, and returns to respondents. The first sentence in this certificate states: "Without any obligation to me, please send me immediately, prepaid, for 5 DAYS FREE EXAMINATION, the 10-volume set of the new WORLD-WIDE ENCYCLOPEDIA." We think the obvious meaning of this sentence is that the set will be *mailed* to the prospective customer to permit him five days to decide if he wants to keep it. While the Commission is entitled to draw upon its own experience to determine what meaning is conveyed to the public by particular advertisements,[3] this interpretation is supported by a preponderance of the evidence. Of the nine consumer witnesses who testified on this point, seven stated that they expected the set to be mailed to them.[4]

It is undisputed that it is respondents' practice not to mail the set but to have it delivered to a prospective purchaser's residence by a salesman. Moreover, the salesman does not work for Consumers Products of America, Inc., which sells the World-Wide Encyclopedia, but is an employee of Eastern Guild, Inc., which sells the more expensive New Standard Encyclopedia. The salesman receives no commission or salary for selling or delivering the World-Wide Encyclopedia. His sales commission is entirely dependent upon the sale of the expensive encyclopedia. Not only is the prospective customer misled into believing that he will receive the World-Wide set by mail but, as will be later shown, he does not get a five day free examination of the set, as specifically promised in the ad-

3. *E. F. Drew & Co. v. Federal Trade Commission,* 235 F. 2d 735 (2d Cir. 1956).

4. Tr. 183, 210, 268, 313, 332; CX 50, pp. 22, 38.

vertisement. Instead, he is immediately subjected to a sales pitch for the New Standard Encyclopedia.

With further reference to whether respondents' advertisements constitute a bona fide effort to sell World-Wide, the complaint alleges that a dictionary is not given free to prospective purchasers, as represented.

Respondents' advertising for its World-Wide Encyclopedia is always headlined in very large letters with a "FREE!" offer of a Webster's Dictionary. The certificate which the reader is invited to complete and send in, after stating that the set can be returned in five days without obligation, further states: "FREE GIFT. Also send me the Thumb-indexed Webster's New American Dictionary as a gift. The dictionary is mine FREE without charge." Respondents contend that the advertising representations constitute only an offer to give the dictionary without additional charge to any person who actually purchases one of the two sets of encyclopedias. This argument has no merit, as the meaning attributed to the offer by respondents is clearly contrary to the language of the advertising. We think it obvious that the advertisement is meant to convey the impression that the dictionary may be retained without charge regardless of whether the prospective purchaser buys the encyclopedia. This is the interpretation placed on the advertising by five of the six witnesses who testified specifically on this issue.[5] Since the evidence establishes that respondents gave the dictionary only on the condition that a person buys a set of encyclopedia, the advertised offer is deceptive and not bona fide.

Also going to the question of the sincerity of respondents' advertising is the specific allegation in the complaint that respondents falsely represent that the offer of the

5. Tr. 210, 233, 238. CX 50, pp. 24, 37.

World-Wide Encyclopedia for $9.95 with the "free" dictionary is limited and expires within ten days. Each of the numerous advertisements in this record bears the conspicuous representation: "This Offer Expires In 10 Days!" The hearing examiner found this claim to be deceptive, relying in part on the admission in respondents' answer that they will deliver the encyclopedia "even if the response to the advertisement is not mailed within said ten-day period, if its salesmen are still within the community after said ten days has expired."

The record supports the examiner's finding without relying on respondent's answer. Commission Exhibit 15A-J are copies of respondents' newspaper ads published in the Philadelphia Daily News. These ads, each featuring the ten day limited offer, were published in the months of February, March, May, June and November, 1960, and in April, May July, August and September, 1961. Obviously, this was a continuing offer and respondents' effort to enhance the value thereof by representing that it was limited to ten days is deceptive.

The complaint further alleges that through the use of the trade name "Educational Foundation," respondents have falsely represented that they operate a nonprofit organization engaged in educational work. The hearing examiner, on the undisputed fact that respondents are engaged in business for profit, found that their use of this trade name has a tendency and capacity to mislead the public. We fully agree with this finding.

The complaint also specifically challenges one other advertising representation. It is alleged that the World-Wide Encyclopedia is not comprehensive, complete, authoritative, new and up to date as claimed. Complaint counsel's proof in support of this charge is the testimony of the expert witness who testified in the absence of respondents' counsel. Contrary to respondents' contention,

we do not find that this witness told an "entirely different story" on cross-examination. However, since we have decided not to consider the testimony of this witness, we must conclude that there has been a failure of proof as to this charge.

We have found that respondents have falsely represented that the advertised set of World-Wide Encyclopedia would be mailed to a prospective purchaser, that he would be allowed a five day free examination of the set before deciding whether to purchase, that he would be allowed to retain the dictionary without charge whether or not he purchased a set of encyclopedia, and that the offer was limited to ten days. These findings fully support the conclusion that respondents were not making a sincere attempt to sell the World-Wide Encyclopedia through their advertising.

Respondents contend that there must be evidence of actual disparagement of or refusal to deliver [6] the advertised product in order to establish the bait and switch scheme found by the examiner.

In making this argument, respondents concede that nine of the witnesses testified that the salesmen disparaged the advertised product. However, they contend that the testimony of nine other witnesses fully supports their own description of their sales technique which they describe as

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6. Respondents state that 5,470 World-Wide Encyclopedias were sold from 1960 through 1965 as compared to 11,937 New Standard Encyclopedias. (This does not include 1961 for which comparable figures were not available.) In our view, these figures support the bait and switch scheme. However, this record clearly establishes that respondents were aware of the investigation initiated in this matter in 1961 and were fully informed as to their practices under consideration. In the previous year, they had sold 268 World-Wide Encyclopedias as compared to 2,334 New Standard. Under these circumstances, we attach little significance to the subsequent increased sales of the World-Wide Encyclopedia.

follows: The salesman is taught never to disparage the product and to introduce the New Standard Encyclopedia to the customer only if he is given the customer's permission to do so. The customer is advised that a more expensive encyclopedia is available, and if the customer expresses interest in seeing it, it is shown to him. Respondents contend that this does not constitute bait and switch and that the greater weight of the evidence supports respondents' description of their practices.

We have read the record and it is beyond doubt that the examiner's findings on this issue are supported by the evidence. In fact, the particular means of disparagement generally employed by respondents' salesmen clearly stand out.

Not considering the testimony of the consumer witnesses who appeared in the absence of respondents' counsel,[7] we have in this record the testimony of sixteen witnesses concerning their dealings with respondents' salesmen. Two of these, husband and wife, testified concerning the same transaction. Only four witnesses,[8] whose testimony we will discuss later, did not testify as to actual disparagement by the salesmen.

The most prevalent method of disparagement stems from the repeated reference in respondents' advertising to the educational value of the World-Wide Encyclopedia for children. Thus, respondents' ads contain such claims as "college education in itself" and "is especially valuable where children of school age use these notable volumes as an aid in their studies."

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7. To avoid any misunderstanding, the testimony of all of these consumer witnesses fully supports the pattern of disparagement established by the other witnesses.

8. Mrs. Wajda, Mrs. Barbara Hawkins, Mrs. Oros and Mrs. Lee.

The following is typical of the testimony of eight consumer witnesses:[9]

> Then he [salesman] brought the older books [World-Wide] in and then he told me, he said, you owe it to your child. These books here, I will be truthful with you, these books are outdated. It wouldn't pay for you to buy these books. It won't do your child any good. You can't find the information for what they are teaching in school today (Tr. 168).
>
> I told him [salesman] I had two older grandchildren [in high school] and that the $10 set of books, he said, was for lower grade of school (Tr. 253).
>
> He [salesman] said, first of all, let me ask you how high are your children in school. I told him the only one I had was one girl that goes to Junior High School. He said, that these we have advertised wouldn't be good for her because she is in Junior High, but I have a set I will show you (Tr. 463).
>
> He [salesman] said, "What grade is your son in?" I said, "In the sixth grade," and he said, "Well, apparently this won't do him very much good because it is only good up until the fifth grade, but we have another one." (CX 50, p. 39)

In this last transaction, the salesman was Jack Gerstel, one of the respondent-owners. He was sales manager and it was his duty to train new salesmen. This would appear to explain the same pattern followed by the salesmen involved in the other transactions.

In addition to these eight transactions, two other witnesses testified that the salesmen disparaged the advertised

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9. Mrs. Boyer, Tr. 168; Mrs. Walker, Tr. 206; Mrs. Carhart, Tr. 253; Mrs. Sandelier, Tr. 370; Mrs. Ruth, Tr. 463; Mrs. Buch, CX 50, p. 6; Mrs. Morrow, CX 50, p. 39; Mr. Shire, CX 50, p. 93.

set. In one of these instances, the witness testified that the salesman took one volume of the World-Wide Encyclopedia out of his briefcase "And as he handed it to me, he ruffled through the pages, like you do, and he said 'As you can see, these books aren't complete.' " (Tr. 314). In the other case, the salesman didn't even show the advertised set to the prospective customer. This witness stated that "He [salesman] mentioned about it, I believe, for a couple of seconds, but said there was no comparison to this set [New Standard]. He knew I would not want it." (Tr. 337). It is to be noted that in three other transactions, the prospective purchasers were never shown the World-Wide Encyclopedia by the salesmen.

The complaint charges that respondents were not making a bona fide offer to sell the World-Wide Encyclopedia, that the purpose of the offer was to obtain leads as to persons interested in buying an encyclopedia, that respondents do not deliver the encyclopedia on the terms stated in the advertisement, and that their salesmen disparage the advertised set and make every effort to sell a more expensive set. This is exactly the sales scheme described by ten witnesses in the fourteen transactions documented in this record.[10]

As previously mentioned, there were four consumer witnesses who did not testify as to any oral disparagement of the advertised product by respondents' salesmen. However, the testimony of two of these fully supports the bait and switch scheme found by the examiner.

10. We do not include one transaction, testified to by a husband and wife, since there was no disparagement by the salesman. In that instance, the salesman who called in response to the World-Wide coupon offer, delivered the New Standard set to the husband who did not know what his wife had ordered. The salesman had the husband sign the contract, and refused to take the set back when the wife arrived on the scene.

Both of these witnesses were interested in encyclopedias for their children. One of them stated that the book the salesman showed her was "very handled and rough looking" and when she looked at it she told the salesman "right then" that she was not interested. She further testified "And when I looked at the book, that's when I told him, I don't think that book would do her [child] any justice because it was just like a third grade reader. I said, she's in the fifth grade and I don't think that would do her any good, so I wouldn't be interested in it." [11]

The testimony of another witness is similar. He stated that after the salesman showed him the book "we found that they weren't, you know, books for our child anyway. She was going to high school. And they were a smaller set of books for younger children." [12]

Both of the above witnesses were switched to the more expensive New Standard Encyclopedia. The advertised set was offered to assist children in school without limitation. In our view, respondents' practice of demonstrating a book which in itself discouraged persons from buying for the purpose advertised is sufficient to warrant a finding that respondents' offer was not bona fide.

On this record, we find that the bait and switch charge has been established by substantial evidence, and respondents' appeal on this issue is denied.[13]

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11. Tr. 186.

12. Tr. 360.

13. We find no substance in respondents' argument that the evidence is not sufficient to support the charge for the reason that complaint counsel called only twenty witnesses out of about 58,000 transactions over a six year period. As stated by the court: "The fact that petitioners had satisfied customers was entirely irrelevant. They cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Commission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment petitioners accorded them." *Independent Directory Corp. v. Federal Trade Commission,* 188 F. 2d 468, 471 (2d Cir. 1951).

Respondents have also appealed from the examiner's finding that they have used fictitious names and representations in connection therewith which create the false impression that the named organizations are bona fide businesses engaged in financing, servicing, credit reporting or collection services.

The facts concerning respondents' use of fictitious names are not disputed. A purchaser of a set of New Standard Encyclopedias signs a contract which bears the name of the corporate respondent, Eastern Guild, Inc. Shortly thereafter, the purchaser receives a coupon booklet for installment payments together with a covering letter, each of which bears the name of The First National Fidelity Co. The covering letter contains statements such as "We have approved your application for credit * * *" and "In financing your installment purchases through us * * *."

If a purchaser fails to make a payment, he receives a series of three letters on the letterhead of The First National Fidelity Co. The first of these letters makes reference to "the time we purchased your note."

A purchaser who does not respond to The First National Fidelity Co. letters receives letters from the Metropolitan Credit Bureau. These letters state that Metropolitan is a credit reporting agency, that it has been informed by First National Fidelity Co. that the purchaser has not paid as required and that if the account is not adjusted, the purchaser's credit rating will be recorded in its files.

A purchaser who still fails to pay receives letters from Vogt Collection Service (or Agency). The first of these letters states that "the above-named Creditor [First National] claims that you are indebted to them." It further

advises the purchaser that "you have the opportunity to deal direct with the claimant [First National]" for a period of three days.

Obviously, the import of these letters is that each of the named organizations is separate and distinct from the others and from the respondents. The testimony of the consumer witnesses fully supports that finding by the examiner.[14]

The examiner further found, and it is not disputed on this appeal, that The First National Fidelity Co., Metropolitan Credit Bureau and Vogt Collection Agency are all fictitious names used by respondents and that each is fully owned, operated and controlled by respondents. He concluded that the use of these names by respondents constitutes false and misleading representations.

Respondents present three arguments in their appeal on this issue. First, they contend that all of the fictitious names are properly registered under Pennsylvania law, and doing business in this fashion is permitted and encouraged in that State. Respondents do not go so far as to argue that a fictitious name registered under state law may be used if it has a capacity to deceive the public. Unfair or deceptive acts or practices in commerce are declared unlawful under Section 5 of the Federal Trade Commission Act. We find no authority for the proposition that compliance with a penal state statute, such as is here involved, constitutes a legal defense in a proceeding under the Federal Trade Commission Act. Accordingly, respondents' first argument on this point is rejected.[15]

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14. Tr. 171, 189, 213, 216, 241, 242, 257, 278, 363, 365, 372, 477; CX 50, pp. 32, 69.

15. *In the Matter of Wm. H. Wise Co., Inc.*, 53 F. T. C. 408 (1956).

Respondents next argue that the use of the three fictitious names served an obvious and legitimate economic purpose. They state that the individual respondents control a number of other business organizations dealing in installment sales of articles having nothing to do with encyclopedias. They further state that it would be wasteful to maintain separate collection departments for each of these enterprises and therefore all three fictitious names served all of respondents' sales enterprises at a considerable saving of money. This argument requires little comment. The test of legality under Section 5 is whether or not the practice is unfair or deceptive. If it is, the practice must be prohibited regardless of the economies accruing to the perpetrator.

Finally, respondents contend that complaint counsel produced no evidence that they have used their fictitious names as shields against claims of consumers. The short answer to this argument is that such evidence is not necessary to establish a violation. As the Commission stated in answer to this same argument in the *Wm. H. Wise* case, *supra,* "The basis of the complaint against respondents is that they falsely represented PPS as being a bona fide independent collection agency, when, in fact, it was not, and that such misrepresentation has the tendency and capacity to deceive. Nothing more need be proved." It is established by the documents themselves and by the testimony of consumer witnesses that purchasers are led to believe that their accounts have been turned over to independent agencies for payment and collection. Proof that respondents actually forestalled claims through use of such deception is not required to support an order to cease and desist. This argument by respondent is rejected.

Respondents have presented one final argument which we find to be wholly without substance. They state that as

part of its investigation, the Commission mailed to respondents' customers a questionnaire containing leading questions. They argue that the use of such a questionnaire to refresh the recollections of witnesses destroys the reliability and probity of those witneses and that the examiner erred in failing to strike their testimony.

It is not disputed that questionnaires were sent out by the Commission in the course of the investigation. RX 4 is an example of such questionnaire and the sample covering letter is dated in January 1962. However, there is no evidence from which it can be determined how many of the consumer witnesses even received such questionnaire. More importantly, there is not one shred of evidence that complaint counsel used a questionnaire to refresh the recollection of any witness. Complaint counsel expressly stated on the record that he did not use the questionnaire in talking with the witnesses. His statement is fully supported by the testimony of the only witness who was questioned by respondents' counsel concerning the use of the questionnaire. Accordingly, we reject respondents' argument on this issue.

With the exceptions previously noted, we will adopt the hearing examiner's order. However, on the facts of this case, we believe that the examiner's order should be implemented by an additional prohibition to insure enforcement of our findings of a violation.[16]

The evidence establishes that respondents maintain an average of twelve salesmen at any given time. However, in any given year, respondents employ from thirty-five to forty salesmen. Obviously, a strict degree of control is required over these transient employees. Moreover, these persons are employees of Eastern Guild, Inc., which sells

16. *Federal Trade Commission v. National Lead Co.*, 352 U. S. 419 (1957).

the more expensive New Standard Encyclopedia. They receive no commission or salary for selling or delivering the World-Wide Encyclopedia. Their only remuneration is based on sales of the more expensive set. This sales technique requires an affirmative means of assuring that the order will be obeyed. Accordingly, respondents will be required to deliver a copy of our order to all present and future salesmen and to obtain a signed statement from these persons that they agree to refrain from engaging in the practices prohibited by the order and further agreeing that upon failure to do so, they may be dismissed or their commissions, salaries or other remuneration may be withheld.

On the basis of the foregoing, respondents' appeal from the examiner's ruling that the charge set forth in subparagraph 5 of Paragraph Seven of the complaint has been sustained, is granted. In all other respects, respondents' appeal is denied. An appropriate order will be entered.

September 7, 1967

APPENDIX E.

FILED: January 10, 1967

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

DOCKET No. 8679

In the Matter of
CONSUMERS PRODUCTS OF AMERICA, INC.,
A CORPORATION,
EASTERN GUILD, INC., A CORPORATION,
KEYSTONE GUILD, INC., A CORPORATION,

and

JACK WEINSTOCK, NAT LOESBERG,
JACK GERSTEL, AND LOUIS TAFLER,
INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATIONS

INITIAL DECISION.

ANDREW C. GOODHOPE, *Hearing Examiner*

CHARLES W. O'CONNELL, AND FAUSTER VITTONE,
Counsel in Support of the Complaint

GOODIS, GREENFIELD, MARIN & MANN
Philadelphia, Pennsylvania, by
THEODORE R. MANN, *Counsel for the Respondents*

The Federal Trade Commission issued its complaint against respondents on March 1, 1966, charging them with violations of Section 5 of the Federal Trade Commission Act as a result of their advertising, sales methods and pro-

cedures used in collecting delinquent accounts in connection with their sale of the World-Wide Encyclopedia and the New Standard Encyclopedia. The respondents filed an answer in which they admitted certain allegations of the complaint but denied that they had violated Section 5 of the Federal Trade Commission Act in any manner.

This matter is before the hearing examiner for final consideration on the complaint, answer, evidence and the proposed findings of fact and conclusions and memoranda and briefs filed by counsel for respondents and counsel supporting the complaint. Consideration has been given to the proposed findings of fact and conclusions and briefs submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom and issues the following order:

FINDINGS OF FACT.

1. Respondent Consumers Products of America, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 1315 Vine Street, Philadelphia, Pennsylvania.

2. Respondent Eastern Guild, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 1315 Vine Street, Philadelphia, Pennsylvania.

3. Respondent Keystone Guild, Inc. is a corporation organized, existing and doing business under and by virtue of

the laws of the State of Pennsylvania, with its office and principal place of business located at 908 Penn Avenue, Pittsburgh, Pennsylvania.

4. Respondents Jack Weinstock, Nat Loesberg and Louis Tafler are officers and stockholders of the corporate respondents. Their office and principal place of business is located at 1315 Vine Street, Philadelphia, Pennsylvania. They formulate, direct and control the acts and practices of the said corporate respondents, including the acts and practices hereinafter set forth (Tr. 422-424).

5. Jack Gerstel was an officer and stockholder of the corporate respondents until September, 1965 engaged in teaching and training new salesmen and handling salesmen in the field. His function was that of sales manager (Tr. 422). He is no longer in any way connected with the business activities of the respondents except as a stockholder (Tr. 424).

6. Respondents have adopted and used various trade names, discussed hereinafter, including the names: Educational Guidance Service (CX 15A); Consumers Educational Service (CX 15F); Educational Foundation (CX 4A, CX 16); E. G. Ltd. (CX 22), and E. G. Inc. (CX 23).

7. All of the respondents described above, both corporate and individual, have been active in and are responsible for all of the business activities discussed hereinafter.

8. Respondents are now, and since at least 1960, have been engaged in advertising and selling encyclopedias, dictionaries and other books and publications to the public. In the course and conduct of this business, respondents have caused their products to be advertised, sold and

shipped in interstate commerce and have maintained a substantial course of trade in such commerce, as "commerce" is defined in the Federal Trade Commission Act (Resp. Ans., Par. 3; Tr. 418).

9. The principal publications offered for sale and sold by respondents are two sets of encyclopedias: World-Wide Encyclopedia and New Standard Encyclopedia. The World-Wide Encyclopedia consists of ten volumes and sells for $9.95. The New Standard Encyclopedia consists of fourteen volumes and sells for $159.50. Included with the New Standard Encyclopedia is an information service and a quarterly loose-leaf extension service. The World-Wide Encyclopedia is sold by Consumers Products of America, Inc. (Tr. 415) and the New Standard Encyclopedia is sold by Eastern Guild, Inc. (Tr. 427).

10. Consumers Products advertises World-Wide Encyclopedia primarily through newspaper advertisements, car cards for use in transit systems, TV Guide and television (Tr. 416-417). Consumers Products expends approximately $4,000 a month in advertising World-Wide Encyclopedia (Tr. 425). Eastern Guild, Inc. does no advertising of the New Standard Encyclopedia. No salesmen are employed by Consumers Products in selling World-Wide Encyclopedia (Tr. 516). An average of 12 salesmen per year are employed by Eastern Guild, Inc. to sell the New Standard Encyclopedia (Tr. 426). Respondents' advertising budget for World-Wide is approximately $48,000 a year but sales of World-Wide average approximately $11,000 per year (Tr. 544-545).

11. Typical of the advertisements for the sale of World-Wide Encyclopedia placed by respondents in the newspapers, car cards and TV Guides since 1960 is the following:

FREE

THIS 1200 PAGE

WEBSTER'S DICTIONARY

"Thumb-Indexed"

YOURS AS A GIFT...

TO INTRODUCE YOU TO THE NEW

WORLD WIDE ENCYCLOPEDIA

WITH THIS SENSATIONAL OFFER!

Readers! Here is one of the most amazing introductory offers ever made. A chance to receive FREE, the WEBSTER'S New American DICTIONARY. Thumbed-indexed—the one book that educators agree is a MUST in every library.

It's a reference book every family needs in order to understand the correct usage and meaning of words, phrases, sentence structure, grammar—and to broaden its vocabulary and master the English language.

It's yours FREE . . . to introduce you to what we believe to be one the greatest achievements in publishing history—the new WORLD-WIDE ENCYCLOPEDIA! So read every word of this message carefully—THEN ACT AT ONCE!—for this is truly the opportunity of a lifetime!

10 DELUXE VOLUMES
3200 PAGES
OVER 2,000,000 WORDS
MORE THAN 1,000 ILLUSTRATIONS.
Each volume 5¾ x 8¾ inches, over 1 inch thick. Luxurious duotone binding—Stamped in black and gold.
COMPLETE AUTHORITATIVE! UP TO DATE!

ALL TEN VOLUMES FOR ONLY

$9.95 DOWN

$1.00 A WEEK

YOU'VE ALWAYS WANTED TO OWN A SET OF ENCYCLOPEDIA—NOW YOU CAN AFFORD IT!

For years, many American families who wanted and needed a really comprehensive encyclopedia were kept from giving their children the educational advantages of owning such a set, simply because the price was always prohibitive. So months ago, one of America's leading publishers—in conjunction with Consumers Products of America, Inc.—decided to overcome this problem and to produce a suitable encyclopedia at a price that ANYONE could afford.

And now, at last, IT'S HERE—THE WORLD WIDE ENCYCLOPEDIA!—in ten compact volumes. Makes for greater speed, ease and clarity—putting any information you may want at your fingertips far more easily than cumbersome, out-of-date sets that cost a great deal more.

It's brand new and up-to-date in every respect, fresh off the presses. It is replete with dynamic, vital knowledge to which you and your children will turn again and again throughout the years—reference books you will enjoy for a lifetime!

Yes, you can now be the proud possessor of a truly fine encyclopedia set at a price so amazingly low that it sounds unbelievable. And in addition, to introduce the new World Wide Encyclopedia, we are giving—FOR A LIMITED TIME ONLY—the WEBSTER'S NEW AMERICAN DICTIONARY, illustrated above, with our compliments! This is truly an amazing offer worth taking advantage of.

We could write pages and pages of sales arguments about why you should own a set of the WORLD WIDE ENCYCLOPEDIA—but we know that it's hard to sell anything without first showing what you are getting for your money. That's why we want to send you this treasure house of knowledge for FREE EXAMINATION—together with the WEBSTER'S New American DICTIONARY. We want you to examine it carefully. Show it to your friends, your librarian—anyone you wish. Compare it page by page with other sets of its kind selling for three times as much.

SEND NO MONEY!

JUST CLIP AND MAIL COUPON!

VALUABLE GIFT CERTIFICATE
EDUCATIONAL FOUNDATION
1315 Vine St., Philadelphia 7, Pa. Dept.CFP-2G

Without any obligation to me, please send me immediately, prepaid, for 5 DAYS FREE EXAMINATION the 10-volume set of the new WORLD WIDE ENCYCLOPEDIA. After 5 days I will either return the set and owe you nothing, or keep it and send you $1.00 down, and the balance $1.00 a week until the special introductory price of only $9.95 has been paid (no other charges).

FREE GIFT Also send me the Thumb-indexed WEBSTER'S New American DICTIONARY as a gift. The Dictionary is mine FREE without charge.

Name _____

Street _____

City and State _____

Phone _____

(In order to save time and money, we would appreciate receiving your phone number.)

FEDERAL TRADE COMMISSION
Central Florida Office

12. Based upon this advertisement and others of a similar nature (CX 15-21), counsel in support of the complaint contend that the respondents have made a number of false and misleading statements. (1) That the ads constitute a bona fide offer to sell World-Wide Encyclopedia at the price and on the terms stated in the ads. (2) That the World-Wide Encyclopedia and the dictionary will be delivered to prospective purchasers with a five-day free examination without any further condition, obligation or requirement. (3) That the offer in the ads is limited and expires within ten days. (4) That the dictionary is "free" and is delivered to and may be retained by all prospective purchasers without charge, condition or obligation other than as set forth in the advertisement. (5) That World-Wide Encyclopedia is comprehensive, complete, authoritative, new and up-to-date. (6) That through use of the trade name "Educational Foundation" that respondents operate a non-profit organization engaged in educational work.

13. Respondents' advertisements of the World-Wide Encyclopedia are quite clearly made for the purpose of obtaining the names and addresses of people who are interested in the purchase of an encyclopedia principally for the use and education of their children. When the coupon is filled out by a prospective buyer and sent into the respondents' place of busines, the encyclopedia is not shipped prepaid or any other way to the prospective purchaser, nor is the dictionary. Instead, a salesman calls upon the prospective customer, demonstrates at the most one copy of the World-Wide Encyclopedia and quickly introduces the purchaser to the more expensive New Standard Encyclopedia and bends every effort to sell the New Standard Encyclopedia. This is nothing more than an

age old bait and switch operation with the advertisement of the World-Wide Encyclopedia being the bait to get the prospective purchaser's name and address and thereafter switch him to the New Standard Encyclopedia. Respondents urge that the evidence of actual disparagement of the World-Wide Encyclopedia is lacking. In the examiner's opinion, it is not necessary that to constitute a successful bait and switch scheme that the disparagement need be any more than is demonstrated by this record. A bait and switch operation, when used by a skillful operator, can be so effective that the victim is practically unaware of what has happened to him until his name is on a contract and the salesman gone and he has some time to reflect upon what has happened to him.

14. A comparison of the annual sales of the two encyclopedias further demonstrates that virtually no attempt is made to sell the World-Wide. Sales from 1962 to 1965 are as follows:

	New Standard	*World-Wide*
1960	$600,000	$ 2,680
1962	528,000	8,460
1963	646,400	12,610
1964	631,200	12,060
1965	600,800	18,870 (Tr. 541-542; 544-545)

15. Furthermore, when one compares respondents' total sales of the World-Wide Encyclopedia with its annual advertising expense on the World-Wide of $48,000 per year, it is quite apparent what the plan of operation is. Respondents do no advertising whatsoever of the New Standard Encyclopedia. In addition the fact that respondents employ no salesmen to sell the World-Wide Encyclopedia but do to sell the New Standard is convincing proof that this is simply a bait and switch plan. The

salesmen receive no commission or salary for selling or delivering the World-Wide Encyclopedia. Their entire sales commissions are based upon their sales of New Standard Encyclopedia. It appears that their only contact with the World-Wide Encyclopedia is to carry a somewhat worn copy in their brief case to attempt to establish a facade of complying with the terms of the advertisements quoted above, but in reality, is nothing more than a lead in to the bait and switch operation.

16. The witnesses who appeared and testified in this matter were unanimous that no serious attempt was made to sell them the World-Wide Encyclopedia, that only brief reference was made thereto and the entire sales presentation by respondents' sales organization was directed to selling the New Standard Encyclopedia (Tr. 70, *et seq.*; 86, *et seq.*; 103, *et seq.*; 120, *et seq.*; 134, *et seq.*; 168, *et seq.*; 179, *et seq.*; 206, *et seq.*; 313, *et seq.*; 369, *et seq.*, and 462, *et seq.*). Consequently, it must be concluded that respondents' ads do not constitute bona fide offers to sell the World-Wide Encyclopedia on the terms set forth in the advertisements.

17. The testimony of the witnesses was also unanimous that respondents never mailed or delivered prepaid as the ads state any copies of the World-Wide Encyclopedia for a 5-day free examination. No such opportunity was ever given any of the witnesses who appeared and testified. Instead, a salesman called with one copy of the World-Wide Encyclopedia and immediately began to discourage its purchase and encourage the purchase of the new Standard Encyclopedia.

18. Respondents' advertisements have been run in various newspapers, TV Guides, car cards and television

for a number of years. There has been no limitation as to time ever enforced by the respondents. Indeed, in Paragraph 7 of the respondents' answer, respondents admitted that they will deliver the World-Wide Encyclopedia to a prospective customer "even if the response to the advertisement is not mailed within said ten-day period, if its salesmen are still within the community after said ten days has expired."

19. The entire sense of respondents' advertisements is that if anyone mails in the coupon which is a part of the advertisement, he will receive prepaid for a 5-day free examination the World-Wide Encyclopedia and a copy of "Webster's Dictionary." The ads leave no doubt that anyone may keep the Webster's Dictionary even though he may decide after examination not to purchase the World-Wide Encyclopedia. The terms of this advertisement are never carried out since the dictionary is only given to a customer who actually purchases the World-Wide Encyclopedia or the New Standard Encyclopedia. In addition, since the condition is imposed by the respondents that one or the other set of encyclopedias must be purchased before the dictionary is given to anyone, it cannot be considered to be a free gift as the ad asserts. Rather, it is given on the condition that another purchase be made and is therefore not a free gift.

20. Respondents' claims in their advertising that the World-Wide Encyclopedia is comprehensive, complete, authoritative, new and up-to-date are also false and deceptive. An examination of the World-Wide Encyclopedia makes it quite obvious that it is at best a very cheap set, poorly printed on poor paper. A brief study of some of the entries demonstrates the lack of accurate and complete informa-

tion. An expert was called by counsel in support of the complaint to criticize the World-Wide Encyclopedia. Her testimony was quite confused but she nevertheless amply demonstrated that the World-Wide Encyclopedia is a very poor set (Tr. 35, *et seq.*; 593, *et seq.*). Respondents' advertising claims cannot be considered to be merely harmless puffing since the claims are so extreme and are distinctly a part of respondents' bait and switch method of sales.

21. In their advertisements, respondents from time to time have used the name "Educational Foundation." The use by respondents of this term constitutes false and deceptive advertising since it clearly imports that the respondents are engaged in some sort of non-profit operation. The respondents are in no way engaged in an eleemosynary program but are strictly in business for profit. *In the Matter of American Photographic Society, et al.*, 54 F. T. C. 524; see also *In the Matter of Atlantic Research Foundation, Inc., et al.*, 46 F. T. C. 558. Consequently, their use of this term constitutes false and misleading representations.

22. At the time respondents make a sale of the New Standard Encyclopedia through their sales force, the purchaser signs a contract with the Eastern Guild, Inc. (CX 22). Within a very short time the customer receives a payment booklet with a covering letter from The First National Fidelity Co. (CX 23A and B). The letter to the customer advises that The First National Fidelity Co. has approved the customer's application for credit and states that this company is handling the financing of the installment purchase of the New Standard Encyclopedia. In the event a payment is not sent in to The First National Fidelity Co. by the customer, a number of follow-up letters are used on the letterhead of The First National Fidelity Co. (CX 24A-C, 25). The First National Fidelity Co. is a

fictitious name used by the respondents for collection purposes. It is not an independent corporation or organization, but is completely owned, operated and controlled by the respondents (Tr. 439, *et seq.*).

23. In the event there are further non-payments of the amounts due for the purchase of a New Standard Encyclopedia, the customer then receives letters from the Metropolitan Credit Bureau soliciting payment of the delinquent account. The import of these letters (CX 26A and B) is that the Metropolitan Credit Bureau is separate and distinct both from The First National Fidelity Co. and from the respondents, corporate and individual. In fact, the Metropolitan Credit Bureau is merely a fictitious name used by respondents in attempting to collect delinquent accounts. The Metropolitan Credit Bureau is owned, operated and controlled completely by the respondents.

24. The next step in attempting to collect delinquent accounts is the use of a number of letters from the Vogt Collection Agency (CX 27A and B, 28A and B). These letters clearly import that the Vogt Collection Agency or Vogt Collection Service is a separate and distinct collection agency from The First National Fidelity Co. and any of the respondents, corporate or individual. The fictitious trade name, Metropolitan Credit Bureau, is also used in connection with the Vogt Collection Agency or Service correspondence. In fact the Vogt Collection Agency is merely a fictitious name used by the respondents to collect delinquent accounts. The Vogt Collection Agency is owned, operated and controlled by the respondents.

25. Through the use of these fictitious names, the respondents have represented that The First National Fidel-

ity Company, the Metropolitan Credit Bureau and the Vogt Collection Agency are independent financial institutions or credit reporting and collecting agencies engaged in the collection of accounts and delinquent accounts which have been referred to them by a separate and distinct third party.

26. The First National Fidelity Co., the Metropolitan Credit Bureau and the Vogt Collection Agency are not bona fide, independent financial institutions engaged in financing, servicing and collecting installment or delinquent accounts. They are simply fictitious names used by the respondents in financing and collecting accounts and delinquent accounts (Tr. 439, *et seq.*). Consequently, their use by respondents constitutes false and misleading representations.

27. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of encyclopedias, dictionaries and other books and publications of the same general kind and nature as those sold by respondents (Admitted in Resp. Ans., Para. 11).

28. Counsel for respondents urged that conducting of the hearing in his absence and denial of his request for a 24-hour continuance of hearings violated the Fifth and Sixth Amendments of the Constitution and Section 6 of the Administrative Procedure Act (Resp. Proposed Finding 42, p. 14; Part VI, p. 35, Resp. Br.). This contention by counsel for the respondents is rejected.

29. The hearings in this matter were scheduled to commence September 26, 1966, in Philadelphia, Pennsylvania. The hearing rooms had been reserved and the hearing ex-

aminer had issued subpoenas for hearings throughout the week of September 26, 1966, for the case-in-chief. Late on Friday afternoon September 23, 1966, counsel for the respondents contacted the hearing examiner and advised him that he was engaged in a trial before the Philadelphia Common Pleas Court and that the matter would not be completed on the 23rd of September and would be carried over until September 26, 1966. The hearing examiner immediately contacted counsel in support of the complaint who agreed to contact their witnesses subpoenaed and scheduled for Monday, September 26, and cancel the hearing on that day. This was done. On Monday, September 26, 1966, the hearing examiner contacted counsel for respondents who was engaged in trial and was advised by him that the Common Pleas trial would probably continue over until Tuesday September 27. The examiner at that point could neither contact counsel in support of the complaint nor any of the witnesses scheduled for Tuesday and counsel for respondents was advised that the hearings would undoubtedly have to commence on Tuesday and to have another attorney appear at the hearing Tuesday morning. This was done and Mr. Robert K. Greenfield, a member of the respondents' law firm, appeared at the hearing (Tr. 25, *et seq.*). Counsel in support of the complaint were unable at this late date to cancel the witnesses called for that day, the majority of whom came from areas a considerable distance from the City of Philadelphia. The hearing examiner made arrangements on his own motion for procuring a daily copy of the transcript of hearings for the use of counsel for the respondents. No attorney was present representing respondents nor were any of the respondents or their officials nor employees present at the hearing on September 27. On September 28 counsel for respondents was given a copy of the transcript of the preceding day's hearings and was ad-

vised that any of the witnesses who appeared and testified on the preceding day would be recalled for cross-examination at the request of counsel for the respondents. Counsel for respondents later requested the right to cross-examine two of the witnesses who had appeared in his absence. They were recalled and fully cross-examined by counsel for the respondents (Tr. 582, *et seq.*; 593, *et seq.*) Counsel for respondents has made no specific objections to any of the questions or answers appearing in the transcript of hearing for September 27, 1966, but merely moved that the entire hearing for that day be stricken from the record. This motion was denied by the hearing examiner. Under these circumstances and while the examiner is well aware that a respondent can only be represented if his counsel is present, no harm, injury, or prejudice has resulted from the manner in which these hearings were conducted. Counsel for the respondents has failed to demonstrate with any specificity as to how the respondents have possibly been prejudiced by the conduct of these hearings.

CONCLUSIONS.

1. The use by respondents of the false, deceptive and misleading statements and representations and practices as set forth in these findings has had, and now has, the capacity and tendency to mislead and deceive a substantial number of members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true, and to cause substantial numbers of the purchasing public to purchase substantial quantities of respondents' products because of such erroneous and mistaken belief.

2. The aforesaid acts and practices of respondents, as herein found in these findings, were and are all to the prejudice and injury of the public and of respondents' competi-

tors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST.

It Is Ordered that respondents Consumers Products of America, Inc., a corporation, and its officers, Eastern Guild, Inc., a corporation, and its officers, Keystone Guild, Inc., a corporation, and i's officers, and Jack Weinstock, Nat Loesberg, Jack Gerstel and Louis Tafler, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of encyclopedias, books or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise or services.

2. Discouraging the purchase of, or disparaging, any products or services which are advertised or offered for sale.

3. Representing, directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services.

4. Representing, directly or indirectly, that said merchandise will be delivered to prospective pur-

chasers for a five-day free examination or for any other period of time without clearly and conspicuously revealing all of the conditions, obligations or requirements, pertaining to said offer.

5. Representing, directly or indirectly, that any merchandise is "free" or is delivered to or may be retained by purchasers or prospective purchasers without clearly and conspicuously revealing all of the terms, conditions or obligations necessary to the receipt and retention of said merchandise.

6. Representing, directly or indirectly, that respondents' World-Wide Encyclopedia is comprehensive, complete, authoritative, new or up-to-date.

7. Using the trade name "Educational Foundation" in connection with respondents' enterprises or representing, in any other manner, that respondents operate any non-profit organization engaged in educational work.

8. Representing, directly or indirectly, that any offer is limited as to time, provided, however, that it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that such time restriction or limitation was actually imposed and in good faith adhered to by respondents.

9. Representing, directly or indirectly, that The First National Fidelity Co., Metropolitan Credit Bureau, or Vogt Collection Agency or any other fictitious name, or trade names owned in whole or in part by respondents or over which respond-

ents exercise any direction or control are independent, bona fide financing, collection or credit reporting agencies; or representing in any other manner that delinquent accounts have been turned over to a bona fide, separate collection agency or to a credit reporting agency for collection or for any other purpose unless respondents in fact have turned such accounts over to an agency of the nature represented.

10. Misrepresenting, in any manner, the kind of offer made to sell merchandise, the terms, limitations or conditions of any offer, the quality, composition or characteristics of respondents' merchandise, or the nature or status of respondents' business or of their collection operations.

ANDREW C. GOODHOPE,
Andrew C. Goodhope,
Hearing Examiner.

January 10, 1967.

APPENDIX F.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 8679.

In the Matter of
CONSUMERS PRODUCTS OF AMERICA, INC.,
A CORPORATION,
EASTERN GUILD, A CORPORATION,
KEYSTONE GUILD, INC., A CORPORATION,

AND

JACK WEINSTOCK, NAT LOESBERG,
JACK GERSTEL, AND
LOUIS TAFLER, INDIVIDUALLY AND AS
OFFICERS OF SAID CORPORATIONS.

COMPLAINT.

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Consumers Products of America, Inc., a corporation, Eastern Guild, Inc., a corporation, Keystone Guild, Inc., a corporation, and Jack Weinstock, Nat Loesberg, Jack Gerstel, and Louis Tafler, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in

respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent Consumers Products of America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 1315 Vine Street, in the City of Philadelphia, State of Pennsylvania.

Respondent Eastern Guild, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at the above stated address.

Respondent Keystone Guild, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 908 Penn Avenue, in the City of Pittsburgh, State of Pennsylvania.

Respondents Jack Weinstock, Nat Loesberg, Jack Gerstel and Louis Tafler are officers of the corporate respondents. Their office and principal place of business is located at 1315 Vine Street, in the City of Philadelphia, State of Pennsylvania. They formulate, direct and control the acts and practices of the said corporate respondents, including the acts and practices hereinafter set forth.

In the course and conduct of their business operations, as hereinafter set forth, the respondents adopted and used various trade names. For example, respondents Consumers Products of America, Inc., and Keystone Guild, Inc. trade and do business as Educational Foundation and Consumers Educational Service. Respondent Eastern Guild,

Inc. trades and does business as E-G Ltd. Other trade names also were employed.

All of the respondents, both corporate and individual, cooperate and act together in carrying out the acts and practices hereinafter set forth.

PARAGRAPH TWO: Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of encyclopedias, dictionaries and other books and publications to the public.

PARAGRAPH THREE: In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their places of business in State of Pennsylvania, or from the point of publication thereof, to purchasers thereof located in various states of the United States other than the states in which said shipments originate and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH FOUR: The principal items offered for sale and sold by respondents, as aforesaid, are sets of encyclopedias. One set is advertised and sold under the name "World-Wide Encyclopedia". It consists of 10 volumes and sells for $9.95-$1.00 down and $1.00 a week. The other set is sold under the name "New Standard Encyclopedia". It consists of 14 volumes and sells for $159.50 and is described as a 3-in-1 deal. The deal includes the encyclopedia, an information service and a quarterly loose leaf extension service. This encyclopedia or 3-in-1 deal is not advertised.

PARAGRAPH FIVE: In the course and conduct of their aforesaid business and for the purpose of securing leads to

prospective purchasers for their higher priced encyclopedia, the New Standard Encyclopedia, the respondents have made and are making numerous statements and representations in advertising inserted in newspapers and various other advertising media of interstate circulation concerning their "World-Wide Encyclopedia".

Among and typical of such advertisements is the following:

FREE

With this sensational offer
This 960-Page "Thumb-Indexed"

WEBSTER'S DICTIONARY

.....

YOURS AS A GIFT
To Introduce you to the New

WORLD-WIDE ENCYCLOPEDIA

(Picture of Set)
( )
( )

.....

(Picture of)
( )
(Dictionary)

.....

ALL 10 VOLUMES

$9.95
$1 Down
$1 Week

PLUS
Webster's New National
Dictionary Free of Charge!

This Offer Expires in 10 days!

YOU'VE ALWAYS WANTED TO OWN A SET OF ENCYCLOPEDIA-NOW YOU CAN AFFORD IT!

Send No Money!
... ... Here's All You Do!

Just fill in and
... ... Mail the coupon at right. We will imme-
... ... diately send you a set of the WORLD-WIDE ENCYCLOPEDIA, together with the Free Dictionary. Examine them carefully. You and you alone must be fully satisfied. If you are convinced, as we are sure you will be, that this is truly an amazing educational bargain, keep the set and your Free Dictionary, and pay for the same on easy terms of $1.00 in 5 days and the balance in convenient installments of $1.00 a week, a total of only $9.95 (which includes delivery charges). Otherwise simply return the books--YOU ARE NOT OBLIGED TO KEEP THEM. So don't delay. Be sure to take advantage of this limited offer.

- -

VALUABLE GIFT CERTIFICATE
Educational Foundation Dept. J
1315 Vine St., Philadelphia 7, Pa.

Without any obligation to me, please send me immediately, prepaid, for 5 DAYS FREE EXAMINATION, the 10-volume set of the new WORLD-WIDE ENCYCLOPEDIA. After 5 days I will either return the set and owe you nothing, or keep it and send you $1.00 down, and the balance $1.00 a week until the special introductory price of only $9.95 has been paid (no other charges).
FREE GIFT Also send me the Thumb-Indexed WEBSTER's New National Dictionary as a gift. The Dictionary is mine FREE of charge.

NAME.....
STREET.....
Rural Route.....Box Number.....
P.O. Box Number.....
City and State.....Tel. No....

PARAGRAPH SIX: By and through the use of the above quoted statements and representations, and others of similar import and meaning not expressly set out herein, the respondents, directly or by implication, represented and now represent:

1. That they were making a bona fide offer to sell the said World-Wide Encyclopedia at the price and on the terms and conditions therein stated.

2. That said encyclopedia and dictionary will be delivered to prospective purchasers for a five day free examination without further condition, obligation or requirement.

3. That said offer is limited and expires within ten days.

4. That the dictionary is "free" and is delivered to and may be retained by all prospective purchasers without charge, condition or obligation other than as set forth in said advertisement.

5. That said encyclopedia is comprehensive, complete, authoritative, new and up-to-date.

6. Through the use of the trade name "Educational Foundation", that they operate a non-profit organization engaged in educational work.

PARAGRAPH SEVEN: In truth and in fact:

1. Respondents' offer contained in said advertisement does not constitute a bona fide offer to sell the said World-Wide Encyclopedia at the price and on the terms and conditions therein stated. Said offer was

and is made for the purpose of obtaining leads and information as to persons interested in the purchase of an encyclopedia. After obtaining said leads, respondents did not and do not simply mail or deliver said encyclopedia and dictionary to the prospective purchasers on the terms and conditions stated in the advertisement. On the contrary, respondents' salesmen call on said prospective purchasers and proceed to disparage and make numerous derogatory remarks respecting the completeness, quality, suitability, etc., of said World-Wide Encyclopedia. They make every effort to sell to the prospective purchaser respondents' "New Standard Encyclopedia" for the amount of $159.50.

2. Said encyclopedia and dictionary are not delivered to prospective purchasers for a five day free examination without further condition, obligation or requirement. As hereinabove described, prospective purchasers are subjected to a sales presentation for a wholly different and far more expensive encyclopedia.

3. Said offer is not limited and does not expire within ten days. It is a continuing offer repeatedly advertised by respondents.

4. Said dictionary is not "free" and is not delivered to and may not be retained by all prospective purchasers without charge, condition or obligation.

5. Said World-Wide Encyclopedia is not comprehensive, complete, authoritative, new or up-to-date.

6. Said offer made under the trade name "Educational Foundation" is not an offer made by a non-profit

organization engaged in educational work. Said name is only a trade name employed by respondents for a private enterprise operated for profit.

Therefore, the statements and representations as set forth in Paragraphs Five and Six hereof were and are false, misleading and deceptive.

PARAGRAPH EIGHT: In the course and conduct of their business as aforesaid, the respondents, for the purpose of servicing and collecting their accounts, adopted and used various fictitious trade names such as Metropolitan Credit Bureau, The First Fidelity Company, and Voght Collection Service. In addition to the use of the aforesaid trade names, respondents wrote letters to the purchasers of their encyclopedias on the stationery of said agencies. For example, on the letterhead of The National Fidelity Company the following letter was sent to said purchasers:

"Dear Customer:

"We have approved your application for credit in the amount of $159.50 for 23 months for purchase of THE NEW STANDARD ENCYCLOPEDIA as presented to us by E. G. LTD.

"We are enclosing your coupon book which you should use when making payments on this transaction. Please read carefully the instructions on the cover of the book and make payments as specified by mail or directly at the time sales office.

"In financing your installment purchase through us you are building additional credit for yourself that will be useful in all sorts of future transactions. Prompt payment is important, affixing this measure of character and dependability with your name. Conse-

quently, if any emergency arises that may upset your payment schedule, please call. We may be able to help you avoid a situation that can mar your credit record.

"We hope you will find your association with us pleasant and profitable.

"Very truly yours,

"THE FIRST NATIONAL FIDELITY CO.,

/s/ "GEORGE MARCHAND,
"Time Sales Division"

Another letter on the letterhead of Metropolitan Credit Bureau sent to delinquent accounts reads in part:

"All affiliated members report to this Bureau the names of their customers who have become delinquent in payment of their accounts. Such information is recorded in our files and under proper conditions is available to all credit corporations.

"FIRST NATIONAL FIDELITY CO., Re. E. G. INC. informs us that you have failed either to settle or to adjust your account to which your attention was directed in a recent letter."

PARAGRAPH NINE: By and through the use of the above quoted statements and representations and trade names, and others of similar import and meaning not expressly set out herein, the respondents represented and now represent, directly or by implication:

1. That the First National Fidelity Company is a bona fide, independent financial institution engaged in financing, servicing and collecting installment purchases.

2. That the Metropolitan Credit Bureau is a bone fide, independent credit reporting agency and collection agency engaged in keeping records and reporting on the credit standing or rating of persons, firms or corporations and engaged in the collection of delinquent accounts which have been referred to them by third parties.

PARAGRAPH TEN: In truth and in fact:

1. The First National Fidelity Company is not a bona fide, independent financial institution engaged in financing, servicing and collecting installment purchases. It is simply a fictitious name used by respondents in their financing and servicing of installment contracts.

2. The Metropolitan Credit Bureau is not a bona fide, independent credit reporting agency and collection agency engaged in keeping records and reporting on the credit standing or rating of persons, firms and corporations and engaged in the collection of delinquent accounts which have been referred to them by third parties. It, too, is simply a fictitious name used by respondents in their efforts to collect money owed to them by purchasers of merchandise on credit.

3. As indicated above, respondents also use various other fictitious names which create the false impression that the reference organization is a bona fide business engaged in financing, servicing, credit reporting or collections.

Therefore the statements and representations as set forth in Paragraphs Eight and Nine hereof were and are false, misleading and deceptive.

PARAGRAPH ELEVEN: In the conduct of their business, at all times mentioned herein, respondents have, been in substantial competition, in commerce, with corporations, firms and individuals in the sale of encyclopedias, dictionaries and other books and publications of the same general kind and nature as those sold by respondents.

PARAGRAPH TWELVE: The use by respondents of the aforesaid false, deceptive and misleading statements and representations and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial number of members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true, and to cause substantial numbers of the purchasing public to purchase substantial quantities of respondents' products because of such erroneous and mistaken belief.

PARAGRAPH THIRTEEN: The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this 1st day of March, A. D. 1966, issues its complaint against said respondents.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 20th day of April A. D. 1966, at 10 o'clock is hereby fixed as the time and Federal Trade Commission offices, 1101 Building 11th & Pennsylvania Avenue, N. W., Washington, D. C. as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the

Commission under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint:

IT IS ORDERED that respondents Consumers Products of America, Inc., a corporation, and its officers, Eastern Guild, Inc., a corporation, and its officers, Keystone Guild, Inc., a corporation, and its officers, and Jack Weinstock, Nat Loesberg, Jack Gerstel and Louis Tafler, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of encyclopedias, books or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise or services.

2. Discouraging the purchase of, or disparaging, any products or services which are advertised or offered for sale.

3. Representing, directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services.

4. Representing, directly or indirectly, that said merchandise will be delivered to prospective purchasers for a five day free examination or for any other period of time without clearly and conspicuously revealing all of the conditions, obligations or requirements pertaining to said offer.

5. Representing, directly or indirectly, that any merchandise is "free" or is delivered to or may be retained by purchasers or prospective purchasers without clearly and conspicuously revealing all of the terms, conditions or obligations necessary to the receipt and retention of said merchandise.

6. Representing, directly or indirectly, that respondents' World-Wide Encyclopedia is comprehensive, complete, authoritative, new or up-to-date.

7. Using the trade name "Educational Foundation" in connection with respondents' enterprises or representing, in any other manner, that respondents operate any non-profit organization engaged in educational work.

8. Representing, directly or indirectly, that any offer is limited as to time, provided, however, that it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that such time restriction or limitation was actually imposed and in good faith adhered to by respondents.

9. Representing, directly or indirectly, that Metropolitan Credit Bureau, the First Fidelity Company or Voght Collection Service or any other fictitious name, or trade names owned in whole or in part by respondents or over which respondents exercise any direction or control are independent, bona fide financing, collection or credit reporting agencies; or representing in any other manner that delinquent accounts have been turned over to a bona fide, separate collection agency or to a credit reporting agency for collection or for any other purpose unless respondents in fact have turned such accounts over to an agency of the nature represented.

10. Misrepresenting, in any manner, the kind of offer made to sell merchandise, the terms, limitations or conditions of any offer, the quality, composition or characteristics of respondents' merchandise, or the nature or status of respondents' business or of their collection operations.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 1st day of March, A. D. 1966.

By the Commission.

JOSEPH W. SHEA,
Joseph W. Shea,
Secretary.

SEAL

APPENDIX G.

Section 5(a)(1) of the Federal Trade Commission Act, 15 U. S. C. § 45(a)(1) provides:

> "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are declared unlawful."

Section 5(b) of the Federal Trade Commission Act, 15 U. S. C. § 45(b) provides:

> "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such pro-

ceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part any report or any of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time after notice and opportunity for hearing, modify, reopen and alter, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* that the said person, partnership, or corporation may within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Section 5(l) of the Federal Trade Commission Act, 15 U. S. C. § 45(l) provides:

> Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 923

CONSUMERS PRODUCTS OF AMERICA, INC., ET AL.

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 7–14) is reported at 400 F. 2d 930. Neither the initial decision of the hearing examiner (Pet. App. 41–57) nor the final order and opinion of the Federal Trade Commission (Pet. App. 17–40) is officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15–16) was entered on October 11, 1968. The petition for

[1] "Pet. App." refers to the appendix to the petition for certiorari.

332-792—69

a writ of certiorari was filed on January 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Trade Commission's cease-and-desist order barring petitioners from the use of false or misleading statements in merchandising was reasonably related to redressing the deceptive practices found by the Commission.

STATUTE INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, as amended by 52 Stat. 111 and 66 Stat. 632 (15 U.S.C. 45 (a)(1)), provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

Petitioners seek review of a cease-and-desist order entered against them by the Federal Trade Commission and unanimously affirmed by the court of appeals. They do not challenge the Commission's finding that they engaged in deceptive practices, but contend only that paragraph one of the order is too broad. Paragraph one (Pet. App. 10) requires petitioners to cease and desist from

> Using, in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise or services.

The Commission made the following findings:

At all material times, petitioners were engaged in advertising and selling encyclopedias, dictionaries and other books (Pet. App. 43). The World-Wide Encyclopedia (World-Wide) and New Standard Encyclopedia (New Standard) were their principal sales items (Pet. App. 44). Petitioners ran newspaper, car card, magazine and television advertisements for World-Wide (selling at $9.95) but did not advertise New Standard (selling at $159.50) (Pet. App. 44). The typical advertisement for World-Wide claimed that it was a "college education in itself" and that it "is especially valuable where children of school age use these notable volumes as an aid in their studies" (Pet. App. 32). The advertisement stated that if it were answered within ten days, a free Webster's dictionary would be sent without charge or obligation and that the encyclopedia would be sent prepaid for a five-day free trial (Pet. App. 29–31, 49).

When prospective purchasers answered the advertisements, instead of a dictionary or encyclopedia, they received a visit from a salesman employed by petitioners (Pet. App. 46). The salesman made no serious attempt to sell World-Wide; he directed his entire presentation to the sale of New Standard (Pet. App. 32–35, 46). He displayed a worn and shabby copy of World-Wide and discouraged its purchase by statements that World-Wide was outdated, was for children in lower grades of school than those of the prospective purchaser or was not complete (Pet. App. 32–35). Then he extolled the virtues of New Standard (Pet. App. 32–35). The "free gift"

dictionary was given "free without charge" only to people who purchased an encyclopedia (Pet. App. 29). Salesmen made commissions only on sales of New Standard (Pet. App. 47–48). They received nothing for World-Wide (Pet. App. 47–48). The amount spent in advertising World-Wide each year averaged almost five times its yearly sales (Pet. App. 47). New Standard was not advertised at all (Pet. App. 47).

The Commission found that petitioner's method of selling encyclopedias was a "bait and switch" scheme, and that it was an unfair and deceptive practice under Section 5 of the Federal Trade Commission Act (Pet. App. 22–40). With a modification not here relevant, the court of appeals affirmed and enforced the Commission's order (Pet. App. 1–16).

ARGUMENT

Petitioners here urge only that paragraph one of the cease-and-desist order is too broad, vague and undefined. This Court has repeatedly stated, however, that the scope of an order of the Federal Trade Commission should not be disturbed on judicial review so long as the remedy is reasonably related to the unlawful practices found. *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 612–613; *Federal Trade Commission* v. *Henry Broch & Co.,* 368 U.S. 360; *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 392–395. The Commission's broad discretion to formulate effective relief is not limited to prohibiting the illegal practice in the precise form in which it had previously existed. *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473.

The court below correctly applied these standards in concluding that the Commission's order here was reasonably related to correcting petitioners' violations. As the court below noted, while the specific prohibitions contained in the order might be sufficient to prevent precise repetitions of petitioners' unlawful conduct, the more comprehensive provisions of paragraph one were necessary to prevent petitioners from changing the "formula" of their false, misleading and deceptive statements, and continuing to deceive the public as they had done before (Pet. App. 13).

Such relief was obviously appropriate on this record. The Commission found that petitioners had used bait-and-switch tactics in their sales of encyclopedias over an extended period of time and that they had made a multitude of false representations, including false free offers and misrepresentations as to the quality of their product (Pet. App. 31–35, 48–50). In these circumstances, it is not unreasonable or "asking too much of petitioners to require them to simply tell the truth in their advertisements and oral representations" (Pet. App. 13). As this Court has said, "those caught violating the Act must expect some fencing in." *Federal Trade Commission* v. *National Lead Co.,* 352 U.S. 419, 431.

There is no conflict between *American Home Products* v. *Federal Trade Commission,* 402 F. 2d 232 (C.A. 6), and the decision below. *American Home Products* involved solely misrepresentations as to the efficacy of one of a number of drug products the company sold. Here, in contrast, the violation was not merely misrepresentations as to the quality of a prod-

uct, but embraced the whole method of doing business itself, *i.e.*, by a bait-and-switch scheme. Paragraph one effectively and appropriately bars petitioners from continuing this deceptive practice in any form. See *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392–393; cf. *Doherty, Clifford, Steers & Shenfield, Inc.* v. *Federal Trade Commission*, 392 F. 2d 921 (C.A. 6).[2]

[2] Petitioners' claim that paragraph one subjects them to contempt proceedings in the absence of a prior administrative proceeding is without substance. As the Court stated in *Federal Trade Commission* v. *Colgate-Palmolive Co.*, *supra*, 380 U.S. at 394:

> * * * If, however, a situation arises in which respondents are sincerely unable to determine whether a proposed course of action would violate the present order, they can, by complying with the Commission's rules, oblige the Commission to give them definitive advice as to whether their proposed action, if pursued, would constitute compliance with the order.

And, as the court below reasoned (Pet. App. 13):

> If petitioners fail to avail themselves of this procedure, and the Commission suspects a violation of paragraph 1 of the order, petitioners will have ample opportunity to dispute the applicability of the order's prohibition within the context of a given factual situation. See Jaffe, The Judicial Enforcement of Administrative Orders, 76 Harv. L. Rev. 865 (1963).

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General,
RICHARD M. MCLAREN,
Assistant Attorney General,
HOWARD E. SHAPIRO,
ROBERT E. EASTON,
Attorneys.

JAMES MCI. HENDERSON,
General Counsel,
J. B. TRULY,
Assistant General Counsel,
CHARLES C. MOORE, JR.,
Attorney,
Federal Trade Commission.

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